

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

EVAN OMAR THURTON,

Defendant and Appellant.

B213740

(Los Angeles County
Super. Ct. No. BA286340)

APPEAL from a judgment of the Superior Court for Los Angeles County,
Bob S. Bowers, Jr., Judge. Affirmed in part, reversed in part.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A.
Taryle, Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy
Attorney General, for Plaintiff and Respondent.

Defendant Evan Omar Thurton was convicted of murder, attempted murder, and conspiracy to commit robbery, and was sentenced to a total of 75 years to life in prison. He appeals, arguing there was insufficient evidence to support his conviction on each of the counts, that he was denied due process because there was insufficient evidence to support the giving of felony murder and conspiracy instructions, and that the sentence imposed (and stayed) on the conspiracy count was erroneous. We conclude there was sufficient evidence to support the murder and attempted murder convictions, but not the conspiracy to commit robbery conviction. We also conclude that, to the extent there was error in giving instructions, that error was harmless. Accordingly, we affirm the judgment as to the murder and attempted murder convictions and reverse the judgment as to the conspiracy conviction.

BACKGROUND

On the morning of June 28, 2005, Jiovani Jones was at an apartment on South La Salle Avenue¹ in Los Angeles with his friend James Lane and Jones' brother.² There were two surveillance cameras on the exterior of the apartment, which fed images to a television inside the apartment. That morning, Jones' brother saw two black men walking back and forth on the steps and porch outside the apartment, watching the building. Jones went outside when the men walked out of view of the cameras and saw the two men getting into the back of a car, van,

¹ The apartment is in Rolling 20's gang territory.

² According to the manager of the apartment building, Lane spent a lot of time at the apartment, which had a lot of foot traffic; 20 to 25 people each day would come to the door for three or four minutes, pass money to someone inside the apartment and receive a small brown paper bag.

or truck (which was later identified as a blue Suburban sports utility vehicle), and another man getting into the front passenger seat.

A few minutes later, Jones and Lane left the apartment to walk up the street to a gas station to get a cigar. As they were walking, they encountered those same three men, later identified as defendant, Lydell Powell, and Tyrone Baldwin. At least two of the men were members of the Rolling 20's gang. According to Jones, he and Lane turned around when they saw the three men approaching, because something seemed wrong. He heard one of the men say "Hey" and then heard a gunshot. He turned and saw Lane on the ground and one of the men pointing a gun at him (Jones). As Jones turned and ran back toward the apartment he heard two or three more gunshots. He later called Lane's wife, who convinced him to talk to the police; he went to the police station with Lane's wife the following day and gave his account of what happened.³

There was another eyewitness to the shooting, who gave a slightly different account. Jorge Melendez was driving on Washington Boulevard near La Salle when he saw three men cross the street and cross paths with two other men who were walking on the same street. After the two groups crossed paths, one of the three men turned around and crept up to the two other men and shot one of them in the head. That man collapsed while the other one ran down the street toward La Salle as the shooter tried to shoot him. The shooter then walked away with his companions; he did not run. Melendez made a U-turn and turned down Normandie Avenue to see if he could see where the three men went. He saw a blue S.U.V. back out onto the street at High Street at a very high speed and take off down

³ There were some inconsistencies between what Jones told the police and what he testified to at trial. The most significant inconsistency was that he told the police he had heard only one gunshot (the one that killed Lane), but at trial he testified that he heard two or three gunshots after Lane was killed.

Normandie. He tried to catch up to the S.U.V. to see if the three men he had seen were in it, but the windows were tinted, so he could not see them. He also tried to get the license plate number, but the S.U.V. had paper plates from a dealership or used car lot. He noticed, however, that one of the hubcaps was missing. He spoke to police a short time later about what he saw.

When the police arrived, they found Lane on the ground, dead from a single gunshot wound. He was shot just above the left ear, from behind, from one to three feet away. He still had on his person his wallet, \$704.93 in cash, his wristwatch, a yellow metal ring, two cell phones, a baggie containing what appeared to be marijuana, and other miscellaneous items.

Shortly after the shooting, Margaret Cook received a telephone call from her boyfriend, Bill Lennon. Lennon told her that something had happened and he was leaving town, and told her where the keys were for her blue Suburban. Sometime later, the police contacted Cook at her work. The police had located the Suburban based on Melendez's description and traced the car to Cook.⁴

Detective Ronald Cade picked Cook up and took her to her apartment, where she gave the police permission to search her home. As Detective Cade and other officers were searching the apartment, Cook received another call from Lennon, who told her not to talk to the police or allow them into her apartment. The police found various items in and around a bedside cabinet in which Lennon kept his personal items. Among the items were a sketched diagram or map (which was identified as a diagram of the apartment on South La Salle that Lane and Jones had been in just before the shooting), some marijuana, and a handgun (not the gun used to kill Lane). Detective Cade later showed Cook some photo lineups, from which

⁴ The police subsequently lifted fingerprints and palm prints from the car, and matched some of them to defendant and Lennon.

she identified defendant as a friend of Lennon's, who would "hang out" with him two to three times a week. Detective Cade also showed Lane's friend Jones several photo lineups, from which he identified Tyrone Baldwin as the shooter and defendant and Lydell Powell as the men who were with Baldwin.

Powell was arrested on July 3, 2005, and placed in a cell with Darius Wells, who had been arrested on an unrelated matter. The cell had a recording device. Powell was recorded talking to Wells about the shooting; although he admitted he was there, he claimed he was not involved in it. Defendant and Baldwin were arrested the following day and placed in the same cell, after Powell was removed from the cell. Both defendant and Baldwin were recorded talking about the shooting. Defendant told Wells that Lane was selling "weed" from the apartment on South La Salle, which was in his gang's neighborhood, and that they had to get him "out [of] the way." He and Baldwin said their "homeys put us on game" -- which, according to a gang expert, meant that other gang members gave them orders. Baldwin described shooting the victim in the temple, and defendant said that if his "homey" had not "handle[d]" it, he was going to do it. Defendant also said that Lane had a gun on him, and they took it and got rid of it and the murder weapon. They told Wells that the police told them about a Suburban involved in the shooting, but they were convinced they were safe because the driver of the Suburban, Lennon (who was a member of the Rolling 20's gang, and was known as "O-Dog"), had fled to Las Vegas, and the police would have no case on them without Lennon.

Defendant, Powell, and Baldwin were charged by information with three counts: count 1, murder of Lane (Pen. Code,⁵ § 187, subd. (a)); count 2, conspiracy to commit murder, robbery, and/or burglary (§ 182, subd. (a)(1)); and

⁵ Further undesignated statutory references are to the Penal Code.

count 3, attempted willful, deliberate, premeditated murder of Jones (§ 664/187, subd. (a)). The information also alleged that, as to all three counts, a principal personally and intentionally used and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b), (c), (d), and (e)(1)), and that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the intent to promote, further, and assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(A)).

Defendant and Powell were tried together (Baldwin was tried separately because his attorney was engaged in another trial).⁶ The prosecution's theory at trial was that Lennon, who was an "O.G." or "original gangster" in the Rolling 20's gang, was unhappy that Lane was selling marijuana in Rolling 20's gang territory, and recruited defendant, Powell, and Baldwin to go after Lane and Jones by robbing, burglarizing, and/or murdering them. The jury acquitted Powell, but found defendant guilty of murder, conspiracy to commit robbery, and attempted murder, and found all special allegations to be true. Defendant was sentenced to 25 years to life for the murder, plus 25 years to life for the gun enhancement, and an indeterminate term of life for the attempted murder, plus an additional 25 years to life for the gun enhancement. The sentence on the conspiracy to commit robbery count -- which the court misidentified as conspiracy to commit murder (and therefore imposed a 25 years to life sentence with a 25 years to life enhancement) -- was imposed and stayed under section 654. Defendant appeals from the judgment.

⁶ By the time of trial in this case, Lennon had been arrested and tried in separate proceedings.

DISCUSSION

Defendant contends on appeal that there was insufficient evidence to support his conviction on each of the counts, and that the giving of jury instructions on conspiracy and felony murder violated his right to due process because there was insufficient evidence to support those instructions. We hold there was sufficient evidence to support the murder and attempted murder convictions, but insufficient evidence to support the conspiracy to commit robbery conviction. We also hold that, if there was error in instructing the jury on conspiracy and/or felony murder, that error was harmless.

A. *Substantial Evidence Standard of Review*

“““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203, 253.) “The supporting evidence must be substantial, that is ‘evidence that “reasonably inspires confidence and is of ‘solid value.’”” [Citations.]” (*People v. Marshall* (1997) 15 Cal.4th 1, 34.) “[M]ere speculation cannot support a conviction.” (*Id.* at p. 35.)

B. *Substantial Evidence Supports the Murder and Attempted Murder Convictions*

Defendant argues there was insufficient evidence to support the murder and attempted murder convictions because (1) the jury did not find him guilty of conspiracy to commit murder and therefore the jury necessarily rejected the prosecutor’s argument that defendant and his companions had agreed to kill Lane; (2) there was insufficient evidence to support the conspiracy to commit robbery

conviction and therefore insufficient evidence to support the murder conviction under a felony murder theory; (3) the evidence showed that Baldwin was the shooter, not defendant, and there was no evidence that defendant aided or abetted Baldwin; and (4) there was no evidence that Jones was to be a target of the attack that resulted in Lane's death. We conclude there was substantial evidence that defendant aided and abetted in the premeditated murder of Lane and attempted premeditated murder of Jones.

“‘[T]he law imposes criminal liability upon all persons “concerned” in the commission of a crime. . . . “Liability attaches to anyone ‘concerned,’ however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal.” [Citations.] A person is “concerned” and hence guilty as an aider and abettor if, with the requisite state of mind, that person in any way, directly or indirectly, aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures. [Citations.] [¶] Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant’s criminal responsibility. [Citation.] Likewise, knowledge of another’s criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime. [Citation.]’” (*People v. Garcia* (2008) 168 Cal.App.4th 261, 272-273, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

In the present case, there was substantial evidence that defendant knew of Baldwin’s purpose, shared a common purpose, and encouraged or facilitated the murder of Lane and attempted murder of Jones. The jailhouse tape recordings show that defendant knew that Lane and was selling marijuana in Rolling 20’s territory, and that others were working with Lane, because he referred to the people

selling the drugs as “those niggers.” He also said that his “homeys put us [i.e., defendant and Baldwin] on game” -- which was interpreted by the gang expert as meaning that other gang members gave defendant and Baldwin orders to take care of Lane and Jones -- and that if Baldwin had not “handle[d]” it, he (defendant) “was going to handle it.” Jones testified that he saw defendant and Baldwin outside the apartment, looking as if they were watching the building, and then saw them get into the back of the Suburban together. He also testified that he saw them again a few minutes later, walking toward him and Lane before Baldwin shot Lane and shot at him. Finally, the gang expert testified that, when a person or persons come into a gang’s territory and sell drugs, it is considered disrespectful to the gang, and by shooting the drug sellers, the gang is showing intimidation to other gangs and the community.

A reasonable jury could find, based on this evidence, that defendant and Baldwin shared a common purpose -- to shoot and/or kill Lane and Jones in accordance with the orders of other gang members -- and that defendant encouraged or facilitated the premeditated murder and attempted premeditated murder by accompanying Baldwin and planning to “handle it” if Baldwin did not. We acknowledge that these convictions may seem inconsistent with the jury’s failure to find defendant guilty of conspiracy to commit murder (finding conspiracy to commit robbery instead). But “a jury may properly return inconsistent verdicts on separate counts. . . . Inconsistent findings by the jury frequently result from leniency, mercy or confusion. [Citation.] Such inconsistencies in no way invalidate the jury’s findings.” (*People v. York* (1992) 11 Cal.App.4th 1506, 1510; see also *People v. Avila* (2006) 38 Cal.4th 491, 600 [“As a general rule, inherently inconsistent verdicts are allowed to stand”].) Finally, even though defendant is correct, as we discuss in section C., *post*, that there was insufficient evidence to support the conspiracy to commit robbery

conviction, and therefore there was insufficient evidence to support the murder conviction under a felony murder theory, that insufficiency of evidence does not invalidate the murder conviction under an aiding and abetting theory. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408 [“ordinarily, where there is sufficient evidence to support one of the factual theories of guilt asserted by the prosecution, appellate courts will presume the jury adopted that theory and affirm the judgment”].)

C. *There Was Insufficient Evidence to Support the Conspiracy Conviction*

Defendant argues there was insufficient evidence to support a conviction of conspiracy to commit robbery because there was no evidence to suggest that defendant and any of the others involved in the murder intended to commit a robbery. We agree.

“A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act ‘by one or more of the parties to such agreement’ in furtherance of the conspiracy.” (*People v. Morante* (1999) 20 Cal.4th 403, 416.) In the instant case, although there was substantial evidence that defendant conspired with Baldwin and others to commit an offense, there was no evidence that that offense was robbery.

“Robbery is the taking of ‘personal property in the possession of another against the will and from the person or immediate presence of that person accomplished by means of force or fear and with the specific intent permanently to deprive such person of such property.’” (*People v. Lewis* (2008) 43 Cal.4th 415, 464.) “If the defendant does not harbor the intent to take property from the

possessor at the time he applies force or fear, the taking is only a theft, not a robbery.” (*People v. Davis* (2005) 36 Cal.4th 510, 562.)

In this case, the jailhouse tape recordings and the parties’ conduct before and during the shooting constitute evidence of an agreement to commit an offense, but there was no indication in those recordings or conduct that defendant and his co-conspirators intended to rob Lane or Jones. Instead, defendant stated that the intent was to get the drug sellers “out [of] the way.” Moreover, the evidence showed that defendant and Baldwin walked away after killing Lane, leaving behind everything of value that Lane had in his possession -- including over \$700 in cash -- except Lane’s gun. Although the Attorney General argues that the taking of the gun was evidence that there was a conspiracy to commit robbery, the jailhouse recordings suggest that defendant and Baldwin took the gun as an afterthought after killing Lane, and the prosecutor expressly disavowed that the taking of the gun was a robbery.

The only other evidence the Attorney General relies upon to support the jury’s conclusion that the target offense was robbery was the diagram of the apartment from which the marijuana was being sold, which was found during the search of Lennon’s home, and the testimony that defendant and Baldwin were seen watching the apartment before the murder and attempted murder. But to conclude from that evidence that defendant and Baldwin intended to rob Lane and/or Jones would be mere speculation. Thus it is insufficient to support the conspiracy to commit robbery conviction. (*People v. Marshall, supra*, 15 Cal.4th at p. 35 [“mere speculation cannot support a conviction”].) Accordingly, that conviction must be reversed.

D. *Any Error In Giving Instructions Was Harmless*

The trial court instructed the jury on conspiracy and on felony murder. Neither defendant nor Powell objected to the conspiracy instruction, but Powell objected to the felony murder instruction, arguing there was no evidence that any of the participants were in the process of committing a separate crime when the shooting took place. The prosecutor argued that the felony murder instruction was appropriate because there was ongoing criminal activity from the time the participants got into the Suburban to drive to the location where they were going to commit a robbery or burglary until they reached a place of safety. Defendant submitted without argument. The trial court found there was evidence of ongoing criminal activity, and overruled the objection.

On appeal, defendant argues that the trial court erred by giving conspiracy and felony murder instructions because there was insufficient evidence to support them, and that the error was prejudicial. We disagree.

First, although we have concluded there was insufficient evidence to support the conspiracy to commit robbery conviction, the conspiracy charge was not limited to conspiracy to commit robbery. Instead, defendant was charged with conspiracy to commit robbery, burglary, and/or murder. Even though the jury did not find that defendant conspired to commit burglary or murder, there was evidence (which we have described above) from which a jury could conclude that he conspired to commit murder.⁷ Thus, the trial court properly gave the jury instructions on conspiracy.

Second, even if there was insufficient evidence to support a conviction under a felony murder theory, we find any error in giving the felony murder instruction

⁷ Because there clearly was sufficient evidence to instruct on a conspiracy based upon murder as the target offense, we need not, and do not, determine whether there was sufficient evidence to support the instruction based upon burglary as the target offense.

was harmless. We note that defendant does not contend that the instruction did not correctly state the law; his contention is that it was inapplicable to the facts presented at trial. If he is correct -- an issue we need not decide -- it was error to give the instruction. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [“It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case”]; see also *People v. Cross* (2008) 45 Cal.4th 58, 67 [“Giving an instruction that is correct as to the law but irrelevant or inapplicable is error”].) But “giving an irrelevant or inapplicable instruction is generally ““only a technical error which does not constitute ground for reversal.””” (*People v. Cross, supra*, 45 Cal.4th at p. 67.) “[R]eversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred. [Citation.] [¶] In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict. [Citation.] Furthermore, instruction on an unsupported theory is prejudicial only if that theory became the sole basis of the verdict of guilt; if the jury based its verdict on the valid ground, or on both the valid and the invalid ground, there would be no prejudice, for there would be a valid basis for the verdict. We thus adopt the following test. . . . [T]he appellate court should affirm the judgment unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory.” (*People v. Guiton, supra*, 4 Cal.4th at p. 1130.)

Defendant contends that the record shows that the jury must have found him guilty of murder under an unsupported felony murder theory, and therefore the murder conviction must be reversed. He asserts that, although the verdict did not specify the theory the jury relied upon in finding him guilty of murder -- the

prosecutor had argued that defendant could be found guilty under a premeditation theory or a felony murder theory -- the jury necessarily focused on felony murder because it asked a question about the robbery and burglary instructions that were referenced in the felony murder instructions. He argues that that jury question, when considered in conjunction with the fact that the jury found defendant guilty of conspiracy to commit robbery (which is consistent with a felony murder verdict) and did not find him guilty of conspiracy to commit murder (which he contends is inconsistent with a premeditation murder verdict), demonstrates that he was convicted under an improper felony murder theory.

But the jury's question about the robbery and burglary instructions referenced in the felony murder instruction does not, as defendant asserts, necessarily "reflect[] the jury has 'focused on what it believes are the critical issues in the case.'" (Quoting *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250.) Unlike in *People v. Thompkins*, where the jury's questions were clear indications of the jury's focus -- the jury asked how premeditation and sudden heat of passion interrelate and whether sudden heat of passion could nullify premeditation (*ibid.*) -- the jury's question in the present case merely indicated that the jury believed that the court had failed to provide instructions that were referenced in the felony murder instruction. The jury's question stated: "Please provide instructions re: robbery & burglary as stated on pg. 43, instruction # 540B." While that question certainly demonstrates that the jury read and considered the felony murder instruction, it does not "affirmatively demonstrate[] a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130.)

Nor does the jury's findings regarding the target offense of the conspiracy demonstrate such a reasonable probability when considered in light of the jury's finding that defendant committed the attempted murder of Jones willfully,

deliberately, and with premeditation. It is not reasonably probable that the jury that found that defendant's attempted murder of Jones was premeditated would not also find that defendant's nearly simultaneous murder of Lane was premeditated. Therefore, we conclude that defendant was not prejudiced by the felony murder instruction.

DISPOSITION

The judgment is reversed as to count 2 (conspiracy to commit robbery), and affirmed in all other respects. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward a copy to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.